Supreme Court, U.S.
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In The Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM T. ATKINS,
Petitioner,

v.

DEPARTMENT OF REVENUE, STATE OF OREGON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in an open case before it on direct review, a state court may refuse to recognize this Court's decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989) as a controlling statement of federal law by relying on state decisional law that this Court has specifically identified as refusing to accord full retroactive effect to *Davis*?

2. Whether a state may hold out in papers filed in this Court and to taxpayers in general what plainly appears to be a clear and certain post-deprivation remedy for unconstitutional taxes and then declare, only after the disputed taxes have been paid, that no such remedy exists?

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the petitioner, William T. Atkins, and his wife, Susan A. Atkins, and the Oregon Department of Revenue.

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DEPARTMENT OF REVENUE, STATE OF OREGON,
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PETITION FOR A WRIT OF CERTIORARI

William T. Atkins respectfully petitions this Court for a writ of certiorari to the Supreme Court of Oregon.

OPINIONS BELOW

The opinion of the Supreme Court of Oregon (App. A. 1a-18a) is reported at 320 Or. 713, 894 P.2d 449 (1995). The opinion of the Oregon Tax Court (App. C, 20a-27a) is reported at 13 Or. Tax 65 (1994). The judgment of the Oregon Tax Court (App. D, 28a) is unpublished.

JURISDICTION

The Supreme Court of Oregon issued its opinion on April 6, 1995 affirming the Oregon Tax Court and denying petitioner's entitlement to refunds for the 1987 tax

year. (App. A, 1a) Petitioner's petition for reconsideration was denied on May 23, 1995. (App. B, 19a) This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

4 U.S.C. § 111 provides in relevant part:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

28 U.S.C. § 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The Supremacy Clause of the United States Constitution, Article VI, Cl. 2 provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

The Due Process Clause of the United States Constitution, Amend. XIV, § 1, provides in relevant part:

> . . . [n]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

Pertinent statutory provisions of Oregon's personal income tax scheme are set forth in App. E, *infra*.

STATEMENT OF THE CASE

This case arises in the wake of this Court's decisions in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989); *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993); and *Reich v. Collins*, 115 S. Ct. 547 (1994). In *Davis*, this Court held that state taxing schemes which discriminate in favor of local and state retirees and against federal retirees are invalid under 4 U.S.C. § 111. Oregon, like Michigan, imposed a discriminatory tax upon federal retirees. In *Harper*, this Court held that every court must give retroactive effect to the *Davis* decision. In so holding, this Court specifically identified the court below as one of several state courts that had "refused to accord full retroactive effect to *Davis* as a controlling statement of federal law." *Harper*, 113 S. Ct. at 2515 (footnote omitted). In *Reich*, this Court held in a *Davis*-related case that a state may not "hold out what plainly appears to be a 'clear and certain' post-deprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists." *Reich*, 115 S. Ct. at 549.

This case involves the refusal by State courts to follow the mandates of this Court's decisions in *Reich* and *Harper*. The courts of Oregon continue to refuse to give full retroactive effect to this Court's decision in *Davis*. In addition, the courts of Oregon have now declared that the very state remedy held to be available to Oregon federal retirees in *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied*, 502 U.S. 1030 (1992) to remedy Oregon's violation of 4 U.S.C. § 111, does not exist.

In 1988, the petitioner filed a timely personal income tax return, reporting and paying the Oregon personal income tax on one-half of his 1987 military retired pay.[1]

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[1] During the years in issue in this case, the petitioner's wife remained a California resident. The other half of petitioner's

In 1991, the respondent commenced an audit proceeding of the petitioner's 1987, 1988 and 1989 returns and asserted that the entirety of petitioner's military retired pay was subject to Oregon's personal income tax.[2] In response to the respondent's action, the petitioner timely perfected his objections under, *inter alia*, *Or. Rev. Stat.* § 305.265(5)(App. E, 38a). The petitioner asserted that the respondent, in discharging its obligations in the audit proceeding to determine the correct measure of the tax, was required to give effect to this Court's decision in *Davis*.[3]

The petitioner exhausted all administrative remedies before the respondent. In its audit proceeding, the respondent refused to give retroactive effect to this Court's decision in *Davis* as the controlling interpretation of federal law. During the course of the respondent's proceeding against the petitioner, the petitioner paid all sums asserted due by the respondent in order to avoid the various sanctions and summary remedies imposed under Oregon's scheme and to satisfy Oregon's jurisdictional payment requirement to obtain judicial review. *See, e.g.*, Or. Rev. Stat. §§ 305.220, 305.419, 305.990(4), 305.992, 314.400, 314.525(3). (App. E, 30a, 39a-41a).

The petitioner sought judicial relief before the Oregon Tax Court. The Oregon Tax Court, relying on Oregon's *1992* reconfigured remedial scheme, denied the petitioner's claim for relief with respect to the taxes returned in 1988 on petitioner's 1987 military retired pay. The

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military retired pay for 1987 was originally reported as his wife's California income under California's community property law.

[2] Throughout the proceedings below, the petitioner appeared *pro se*.

[3] Consistent with settled Oregon practice, the petitioner during the course of the respondent's audit proceeding also perfected his objections for the record by filing an amended 1987 return based on this Court's decision in *Davis*. *See* Or. Rev. Stat. §§ 305.270(2), 314.415. (App. E at 33a, 36a).

BEST AVAIL

Oregon Tax Court held that under Oregon's newly declared scheme the petitioner was only entitled to limited relief—the return of only that part of the 1987 tax liability that was paid in and after 1991. The tax court so held, notwithstanding the fact that: i) the petitioner had timely and properly raised his objections and had properly invoked the settled refund remedy for personal income taxes that had been available to Oregon income taxpayers for over sixty years; ii) the respondent had violated its obligation to determine the correct measure of the tax by refusing to give retroactive effect to this Court's decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989); and iii) Oregon does not provide taxpayers a meaningful opportunity to withhold payment and to obtain a predeprivation determination of a tax's validity.

Upon appeal, the Supreme Court of Oregon affirmed the decision of the Tax Court. Upon issuance of its decision, the petitioner petitioned for reconsideration on the grounds that the decision of the Supreme Court of Oregon was contrary to this Court's decision in *Reich v. Collins*, 115 S. Ct. 547 (1994), in that the state of Oregon had engaged in a "'bait and switch'" identical to that of Georgia and the court below had further permitted the State to engage in precisely the same type of remedial "[n]ovelty" proscribed by this Court in *Reich*. The Supreme Court of Oregon summarily denied the petition for reconsideration.

REASONS FOR GRANTING THE WRIT

This case presents questions of substantial public importance concerning the rights of taxpayers to obtain refunds of taxes unconstitutionally or illegally imposed upon them and the obligation of state courts under the Supremacy Clause to give effect to this Court's decisions. In Oregon alone this case implicates the rights of approximately forty thousand elderly federal retirees and the estates of the thousands of federal retirees who have died during Oregon's war of attrition against them. In several

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other states, resolution of the question presented should finally determine whether states may retain hundreds of millions of dollars of taxes unconstitutionally imposed upon both federal annuitants and federal employees.

In addition, the issues in this case have far-reaching consequences that transcend their impact on federal retirees. The mandates of *Reich* and *Harper* are not limited to federal retirees—the issue of whether a state has provided a clear and certain remedy has arisen and will continue to arise in a variety of state tax cases. Here, the result below is in irreconcilable conflict with the mandates of *Reich* and *Harper*. Indeed, the holding below "violates the Supremacy Clause." *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745, 1747 (1995). It also represents a continuation of the disturbing trend established in recent tax litigation that financial considerations render the doctrine of *stare decisis* pliable.[4] In this regard, Oregon has pursued the unseemly strategy of *win at all costs*. For example, it is now apparent that in evading review by this Court in the first Oregon *Davis*-related case,[5] Oregon asserted one position before this Court as to the available adequate state remedy for its *Davis*-related violations of federal law, while simultaneously asserting to the Oregon Supreme Court in another *Davis*-related case,[6] that the very same state remedy never existed. Thus, review by this Court is necessary to protect the integrity of this Court's certiorari process, to assure that the dictates of

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[4] As the decisions of this Court over the last several terms confirm, presumably in an effort to protect states from the fiscal consequences of this Court's decisions, some state courts have adopted attenuated constructions of state refund procedures or employed novel procedural requirements. *See, e.g., Reich v. Collins*, 115 S. Ct. 547 (1994); *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993).

[5] *See Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied*, 502 U.S. 1030 (1992).

[6] *See Ragsdale v. Department of Revenue*, 312 Or. 529, 823 P.2d 971 (1992).

federal due process are applied uniformly by all states, and to signal to all state courts that review by this Court of due process violations will not be evaded by facile interpretations of state law.

Because of the Eleventh Amendment and the Tax Injunction Act, 28 U.S.C. § 1341, taxpayers, such as the petitioner, are relegated exclusively to state courts to press their claims for refunds. But it is state courts that have demonstrated the greatest difficulty in applying the Fourteenth Amendment. This Court is the only federal court that can hear the retirees' claims. Absent review by this Court, "[t]he State too easily avoids its responsibilities and . . . go[es] its way unimpeded and unburdened with any remedy for those who have been wronged during the period of [Oregon's] noncompliance with federal law." *Green v. Mansour*, 474 U.S. 64, 81 (1985) (Blackmun, J., dissenting).

1. After this Court's decision in *Harper*, many states, either by opinion of the state's highest court or stipulation, recognized that refunds of their states' unconstitutionally collected taxes were required.[7] Likewise, following the announcement of this Court's mandate in *Reich*, the State of Georgia immediately acknowledged its re-

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[7] *See, e.g., Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991), *cert. denied*, 113 S. Ct. 3034 (1993) (settled for full refunds with interest); *Hagge v. Iowa Dep't of Revenue and Fin.*, 504 N.W.2d 448 (Iowa 1993) (granting full refunds with interest); *Sheehy v. State*, 250 Mont. 437, 820 P.2d 1257 (1991), *cert. granted and judgment vacated*, 113 S. Ct. 3025 (1993) (settled for full refunds with interest); *Strelecki v. Oklahoma Tax Comm'n*, 872 P.2d 910 (Okla. 1993) (granting full refunds plus interest); *Brumley v. Utah State Tax Comm'n*, 868 P.2d 796 (Utah 1993) (same); *Barker v. State*, 249 Kan. 186, 815 P.2d 46 (1991), *rev'd*, 503 U.S. 594 (1992) (same); *Bass v. State*, 302 S.C. 250, 395 S.E.2d 171 (1990), *cert. granted, vacated and remanded*, 501 U.S. 1246 (1991), *remand*, 307 S.C. 113, 414 S.E.2d 110 (1992), *cert. granted, vacated and remanded*, 113 S. Ct. 3025 (1993) (settled for full refunds plus interest); *Marx v. Brown*, 632 Co. 2d 1315 (Mis. 1994) (granting full refunds with interest).

fund obligation and appropriated the settlement funds to pay all Georgia federal retirees the full refunds and interest at issue in *Reich*. *See, e.g.*, House Bill 90, House Bill 3, 1995 Georgia General Assembly.

However, notwithstanding that the tide has decisively turned in the federal retirees' favor, several states continue to pursue their war of attrition against federal retirees. For example, on remand in *Harper*, Virginia continues to advocate a position that is indistinguishable from the very position rejected by this Court in *Reich*. *See Harper v. Virginia Dept. of Taxation*, No. 940326, Virginia Supreme Court ("Harper III"). Similarly, on remand in *Duffy v. Wetzler*, New York continues in its effort to evade even the refund obligations it previously acknowledged as due before the appellate courts of New York and this Court. *See Duffy v. Wetzler* and *Alderman v. Wetzler*, Index Nos. 7706/89 and 6193/91, N.Y. Supreme Court, Queens County. In Arizona, federal retirees are on appeal for a second time as state tax officials continue their efforts to reconfigure Arizona's refund scheme. *See Bohn v. Waddell*, appeal pending, No. 1 CA-TX, 94-009 (Ariz. Ct. App.). In addition, Arizona continues to enforce, while denying refunds, a scheme which indisputably discriminatorily taxes *current* federal employees' *current* compensation while exempting the same *current* compensation of state employees. *See Kerr v. Waddell*, appeal pending, No. 1 CA-TX, 92-0010 (Ariz. Ct. App.). Finally, in Wisconsin, the state continues its efforts to minimize the amount of the refund obligation finally adjudged by urging that Wisconsin's settled refund scheme does not exist. *See, e.g., Wisconsin Dep't of Revenue v. Hogan*, No. 95-0438 (Ct. App. District IV).

The arguments being advanced in these states are utterly irreconcilable with *Reich*. This Court held in *Reich* that a "State may not . . . reconfigure its scheme, unfairly, in midcourse—to 'bait and switch' . . . ." *Reich*,

115 S. Ct. at 550. Yet, undaunted by their obligations under the Supremacy Clause, these states, like Oregon, continue to urge that " '*novelty* in procedural requirements' " may be employed " 'to thwart review in this Court.' " *Id.* at 551.

Indeed, Oregon is of the apparent view that this Court's decisions do not apply in Oregon unless and until this Court reviews an Oregon decision. The respondent's position below was that *Reich* had no "relevance" to this case. *See, e.g.,* Defendant's Supplemental Memorandum, dated December 20, 1994. Its contemporaneous statement of position in another pending *Davis*-related case is just as breathtaking for its defiant disregard for the State's obligation under the Supremacy Clause:

> *Reich v. Collins* (U.S. Supreme Court No. 98908 [sic], decided December 6, 1994) is similarly distinguishable from *Ragsdale I* and *Ragsdale's* due process analysis is binding on this court so as *to make Reich as irrelevant as Harper* unless the Oregon Supreme Court reverses itself or the U.S. Supreme Court acts to overrule *Ragsdale I.*

See Trial Memorandum of State of Oregon, December 21, 1994, at 4, *Dixon v. State of Oregon,* No. 9311-07480, Circuit Court of Oregon, Multnomah County (emphasis added).

In addition to being in irreconcilable conflict with this Court's decisions in *Reich* and *Harper,* the decision below also conflicts with the post-*Harper* decision of the Florida Supreme Court in *Department of Revenue v. Kuhnlein,* 646 So. 2d 717 (Fla. 1994). In *Kuhnlein,* the Florida Supreme Court rejected Florida's invitations to adopt "an *alleged* common law rule" and an attenuated construction of the "requirement of Florida's refund statutes" which the state had asserted barred the taxpayers' constitutional right to a refund for an "illegal tax." *Id.* at 721 (emphasis added). The Florida Supreme Court held that the State's assertions were "not

proper reasons to bar a claim based on constitutional concerns." *Id.* "[A]ny other rule self-evidently would make constitutional law subservient to the State's will." *Id.*

Thus, despite the clarity of this Court's mandates in *Reich* and *Harper*, the state courts of last resort remain split on whether a state is free to adopt a facile interpretation of state law to defeat "what plainly appears to be a 'clear and certain' post-deprivation remedy [by declaring], only after the disputed taxes have been paid, that no such remedy exists." *Reich*, 115 S. Ct. at 549. Review by this Court is thus necessary in this case to assure, in fact, that the Fourteenth Amendment is applied uniformly in all states.

2. The decision below is irreconcilable with *Harper*. In *Harper*, this Court held that its decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), is "the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper*, 113 S. Ct. at 2517. In the decision below, the Oregon Supreme Court refused to give *Davis* retroactive effect in this case which was open on direct review.

In this case, the underlying predicate was the commencement of an administrative audit proceeding against the petitioner by the respondent. In that proceeding the entirety of the petitioner's 1987 return was put at issue by the respondent and, irrespective of any claim made by the taxayer, the respondent as a matter of federal law was required, in making its determination, to give "full retroactive effect" to this Court's decision in *Davis*. *Harper*, 113 S. Ct. at 2517.[8]

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[8] It is indisputable that the petitioner's right to meaningful relief is protected under the Fourteenth Amendment. "A state that 'establish[es] various sanctions and summary remedies designed'

Oregon's refusal to give *Davis* retroactive effect in this case "violates the Constitution's Supremacy Clause." *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745, 1747 (1995). Here, the petitioner properly asserted his *Davis* defense to the respondent's audit proceeding. *Harper* mandates that the respondent, in making its determination of the correct amount of tax due, ignore its "unconstitutional law." *Reynoldsville*, 115 S. Ct. at 1752 (Scalia, J., concurring). The provision imposing tax upon the petitioner's military retired pay "was unconstitutional . . . and was . . . as inoperative as if it had never been passed." *Id.* The inclusion of the petitioner's retired pay as an item in the measure of the tax, therefore, could not provide a basis to justify *any* part of the respondent's determination. Thus, review by this Court is necessary to insure that Oregon's "lonely eminence," *Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. 2331, 2338 (1994), as the only state to refuse to give *Davis* full retroactive effect comes to an end.[9]

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to prompt taxpayers to 'tender . . . payments before their objections are entertained or resolved' does not provide taxpayers' meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity." *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2519-20 n.10 (1993) (citation omitted). Oregon does not provide taxpayers " 'a meaningful opportunity to withhold payment.' " *Id.* "There is no question that Oregon's statutes encourage payment of tax before litigation of a claim for relief. *See* Or. Rev. Stat. § 305.419 (tax, interest, and all penalties assessed shall be paid on or before the filing of complaint with the regular division of the Tax Court)." (App. A, 15a). *See also* Or. Rev. Stat. §§ 305.990(4), 305.992(1), 314.400, 314.525, 316.992. (App. E, 39a-41a) (imposing a panoply of sanctions, penalties and interest—exceeding 100% of the tax due for failures to pay and/or report taxes claimed due by the State).

[9] To date, this Court has not permitted a state to avoid its obligation under the Supremacy Clause to give *Davis* full retroactive effect. *See, e.g., Pledger v. Bosnick*, No. 91-375, *cert. denied*, 113 S. Ct. 3034 (1993); *Barker v. Kansas*, 91-611, *rev'd*, 503 U.S. 594 (1992); *Harper v. Virginia Dep't of Taxation*, No. 91-794, *rev'd*, 113 S. Ct. 2510 (1993); *Colorado v. Kuhn*, No. 91-980, *cert. dis-*

3. The decision below is irreconcilable with *Reich*, for precisely the reasons stated in *Reich*. For over sixty years, the settled public policy of Oregon has provided that the "provisions of the [refund] statute and regulations" under the modern Personal Income Tax Act "are not designed as traps for the unwary." 19 Op. Att'y Gen. 577, 578 (1940). (App. F, 45a). All personal income taxes in excess of those due, whatever the reason, have been refunded. And the only condition to obtain a refund plus statutory interest on the excess payment is that a taxpayer file a post-payment claim for refund within the time limits established by the general omnibus refund statute under the Personal Income Tax Act. *Id.*[10]

In addition, under settled Oregon practice, even the income tax refund claim filing requirement is liberalized. From the inception of Oregon's modern Personal Income Tax Act, Oregon has followed the informal claim doctrine of federal law:

> [A]n *informal claim* which was filed within the statutory period and which otherwise substantially com-

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missed, 504 U.S. 901 (1992); *Sheehy v. Montana Dep't of Revenue*, No. 91-1473, *cert. granted and judgment vacated*, 113 S. Ct. 3025 (1993); *Bass v. South Carolina*, No. 91-1697, *cert. granted and judgment vacated*, 113 S. Ct. 3025 (1993); *Duffy v. Wetzler*, No. 92-521, *cert. granted and judgment vacated*, 113 S. Ct. 3027 (1993); *Reich v. Collins*, No. 92-1276, *cert. granted and judgment vacated*, 113 S. Ct. 3028 (1993) & No. 93-908, *cert. granted and judgment reversed*, 115 S. Ct. 547 (1994).

[10] For years 1933 to 1938, claims for refund of the personal income tax had to be filed within two years of the date the tax was paid. For years after 1939, the limitation period for filing claims under the personal income tax was liberalized to the later of "three (3) years from the time the return was filed or two (2) years from the time the tax or a portion thereof was paid." Section 14, Chapter 488, Oregon Laws, 1939. The limitation provisions under the 1939 Act remain essentially unchanged under current law. *See* Or. Rev. Stat. §§ 305.270(2); 314.415(1)(b). (App. E, 33a, 36a).

> plied with the requirements of the statutes and regulations pertaining to the tax years in question may be perfected and allowed after the statutory period has elapsed.

Id. (emphasis added).[11]

In an unbroken line of precedent spanning over six decades, the Oregon Supreme Court has repeatedly recognized the right of taxpayers under Or. Rev. Stat. § 305.270, the omnibus refund statute of the Oregon Personal Income Tax Act, to obtain a refund together with statutory interest of all taxes subsequently declared invalid or unconstitutional. *See, e.g., Meredith v. State Tax Comm'n*, 163 Or. 305, 96 P.2d 1082 (1939) (ordering refunds of income taxes invalidly imposed upon federal employee's compensation)[12]; *Smith, Kline & French Lab. v. State Tax Comm'n*, 241 Or. 50, 403 P.2d 375 (1965) (ordering refunds of corporate income taxes declared invalid under the Commerce Clause for years 1955 through 1958); *Wood v. Department of Revenue*, 305 Or. 23, 749 P.2d 1169 (1988) (ordering refunds of personal income taxes unconstitutionally imposed in violation of the Privileges and Immunities Clause for years 1979 through 1981); *Borg v. Department of Revenue*, 308 Or. 34, 774 P.2d 1099 (1989) (ordering refunds of personal income taxes for years *1982-1983* un-

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[11] Oregon's adoption of the federal informal claim doctrine has remained unchanged for over sixty years. Indeed, it has been codified as part of the Oregon personal income tax refund right. Or. Rev. Stat. § 314.011(3) provides that "insofar as is practicable in the administration of this chapter, the department shall apply and follow the administrative and judicial interpretations of the federal income tax law."

[12] *See also* Opinion of the Attorney General, January 24, 1940 (App. F, 43a) (recognizing in the wake of *Meredith v. State Tax Comm'n*, 163 Or. 305, 96 P.2d 1082 (1939), the unqualified entitlement of all federal employees, who had filed either informal or formal claims for refund under Oregon's omnibus refund statute, to obtain a refund of these invalid taxes for years 1938 and before).

constitutionally imposed upon federal obligations in violation of the doctrine of intergovernmental tax immunity). Significantly, contrary to the *novel* result in the decision below, in *Borg*, the Oregon Supreme Court expressly applied the "nondiscrimination rule of *Davis v. Michigan Dep't of Treasury*," in affirming the tax court's order of refunds with full statutory interest under Or. Rev. Stat. § 305.270. *Id.* at 1101-02.

Moreover, consistent with the strong public policy of Oregon recognizing the rights of taxpayers, the Oregon Personal Income Tax Act not only recognizes the rights of citizens to refunds with full statutory interest for taxes subsequently declared invalid or unconstitutional, but also provides prevailing taxpayers in *unclear* cases with a statutory right to attorney fees and costs. *See, e.g., Waterbury v. Department of Revenue*, 11 Or. Tax 314 (1989) (ordering full refunds of personal income tax with full statutory interest under Oregon's ombnibus refund statute, together with attorney fees for taxes unconstiutionally imposed in violation of the doctrine of intergovernmental tax immunity).

In *Reich*, this Court made clear that the dispositive test under the Fourteenth Amendemnt is what a "reasonable taxpayer would have thought" at the time the taxes were paid. *Reich*, 115 S. Ct. at 550. In light of the 60 years of unbroken precedent, respondent's settled practice establishing the taxpayer's right to a refund of taxes invalidly imposed under Chapter 316 of the Oregon Statutes—the Oregon Personal Income Tax Act, and the express provisions of Or. Rev. Stat. § 305.270 providing for the refund of taxes imposed under "Chapter 316" (App. E at 33a), the "average", "reasonable" Oregon taxpayer would have thought that he was entitled to the refund remedy under Or. Rev. Stat. § 305.270. *Id.* at 550.[13] The reasonableness of such taxpayer belief is in-

[13] The tax upon the petitioners' pension was imposed under Chapter 316 of the Oregon Revised Statutes—the Oregon Personal Income Tax Act.

controvertible in light of the Oregon Supreme Court's contemporaneous decision in *Borg, supra,* applying *Davis* in ordering such refunds.

In addition, if no such remedy existed as now claimed by the respondent, then the respondent's *pre-1992* conduct is inexplicable. Certainly, if the refund remedy had been limited as held below, one would expect that the respondent's regulations, forms, annual instructions and press releases would have delineated the limitation of the Oregon refund remedy for the citizens of Oregon. However, no such limitation or distinction was ever noted by the respondent, let alone promulgated to the taxpayers of Oregon. Indeed, consistent with settled practice and precedent, the respondent, in carrying out its statutory duty to prescribe the form and procedure for perfecting refund claims, has prescribed one form and one procedure —that under Or. Rev. Stat. § 305.270 and 314.415.[14]

The game of "'*bait and switch*'" affirmed below is indistinguishable from Georgia's "'bait and switch'" in *Reich*. *Reich*, 115 S. Ct. at 548. Just as in *Reich*, in *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied*, 502 U.S. 1030 (1992), the respondent successfully opposed the taxpayers' claims for relief under 42 U.S.C. § 1983 and state law by asserting that federal retirees had an adequate state remedy and that by pursuing the administrative process, the Oregon Department of Revenue could give the taxpayers all the relief that the taxpayers claimed they were entitled to.[15] The remedy which the State then asserted provided that relief was

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[14] Under Oregon's Taxpayer Bill of Rights, the respondent's director is required to prepare, *inter alia*, a statement which sets forth in simple nontechnical terms the procedures for taxpayers to follow to perfect refund claims. *See* Or. Rev. Stat. § 305.860(c).

[15] Just as in *Nutbrown*, in the wake of *Davis*, Georgia federal retirees were denied judicial relief because "the [Georgia] refund statute provides an adequate remedy for any vestigial disparity." *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74, 75 n.1 (1989).

Oregon's omnibus refund provisions—Or. Rev. Stat. §§ 305.220, 305.222, 305.270 and 305.415. *See, e.g.*, Respondent's Brief in *Nutbrown v. Munn*, SC S36652 at 27 n.15.[16] The Oregon Supreme Court agreed: "[B]ut the Department *can* (and may) give Taxpayers all the relief Taxpayers claim they are entitled to under an appropriate, constitutional reading of the Oregon tax system." *Nutbrown*, 311 Or. at 345 (emphasis in the original). The relief sought by federal retirees in *Nutbrown* and which the Supreme Court of Oregon held was available to them was refunds and interest under Oregon's omnibus refund provisions—Or. Rev. Stat. §§ 305.270 and 314.415. In the decision below, the same court has now held that the very remedy central to its holding of an adequate state remedy in *Nutbrown* never existed.

Similarly, in successfully opposing the taxpayers' petition for writ of certiorari before this Court in *Nutbrown*, the respondent likewise argued that Oregon's omnibus refund remedy under *"O.R.S. Sections 305.220, 305.222, 305.270 and 314.415"* provided the federal retiree taxpayers with an adequate state remedy. *See* Respondent's Brief in Opposition in *Nutbrown v. Munn*, No. 91-457 at 13.[17]

In denying the petitioner relief in this case, the Oregon Supreme Court relied on its post-*Nutbrown*, but pre-*Harper, Davis*-related decision in *Ragsdale v. Department of Revenue*, 312 Or. 529, 823 P.2d 971 (1992).[18] In *Ragsdale*, the Oregon Supreme Court, ignoring 60 years of its own precedent (the unambiguous provisions of Or. Rev. Stat. § 305.270 expressly providing for refunds of

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[16] The relevant excerpt from the respondent's Oregon Supreme Court brief in *Nutbrown* appears in Appendix G, 47a.

[17] The relevant excerpt of the Respondent's Brief in Opposition before this Court in *Nutbrown* appears in Appendix H, 48a.

[18] The petitioner was not a party in the *Ragsdale* case. Unfortunately, Mrs. Ragsdale did not seek review from this Court.

all taxes imposed under "Chapter 316"), employed the very artifice used by the Georgia Supreme Court in *Reich I* to avoid its obligation under the due process clause to provide federal retiree refunds. As in *Reich I*, the Oregon Supreme Court explained that it was construing the refund statute not to apply to "authorize refunds of taxes collected pursuant to *invalidated laws.*" *Ragsdale*, 823 P.2d at 975 (emphasis added). In *Reich*, the "Georgia high court explained that it was construing the refund statute not to apply to 'the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise *invalid.*'" *Reich*, 115 S. Ct. at 549 (citation omitted) (emphasis added). But, just as in *Reich*, here the "'denial by a state court of a recovery of taxes exacted [from the petitioner] in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment . . . .'" *Id.*

The *novelty* of the Oregon court's unseemly decision in *Ragsdale*, replicated here, is readily exposed. The court below was only able to reach the result urged by the respondent by ignoring the express provisions of Or. Rev. Stat. § 305.270 which provides the refund right for *all* taxes under "Chapter 316." Additionally, the Court below omitted from its reading of Or. Rev. Stat. § 305.765 —the express limitation—that this statute only applies *"if there is no other statute authorizing refund thereof."* In so doing, the court not only ignored its own precedent, but also failed to adhere to Oregon's rules of statutory construction. *See, e.g.*, Or. Rev. Stat. § 174.010. (App. E, 41a). *See also Burlington N. Ry. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 463 (1987) (adoption of the court's view "would require amendment rather than construction of the statute[s] and it must be rejected here."). However, by so ruling, the court was thereby able to deny full retroactive effect to *Davis* and limit relief to taxes first returnable in and after April, 1989.

There is not a single case prior to *Ragsdale* which supports or holds that the Oregon omnibus refund provisions under the Oregon Personal Income Tax Act are so limited. In addition, historical practice and interpretation contemporaneous with the adoption of Oregon's modern Personal Income Tax Act do not support the respondent's revisionist history adopted by the court below. *See* 19 Op. Att'y Gen. 577 (1940) (establishing that the respondent's proffered historical rationale for its new position adopted by the court in *Ragsdale* simply is not so). (App. F, 43a).

In addition, it is indisputable that this result oriented decision cannot be sustained as " 'clear and certain.' " *Reich*, 115 S. Ct. at 440. First, prior to *1992* there was no provision for how one "instituted" the "action" to invoke Oregon's new specially reconfigured remedial scheme. The respondent's administrative process under the Personal Income Tax Act, even without manipulation, precludes commencement of an "action" until after the year in which the tax is paid. *Ragsdale*, 823 P.2d at 976-77. Indeed, the court below was only able to overcome this obstacle by again rewriting the language of the statute specifying the commencement of an "action" by substituting therefor the filing of a refund claim. Second, it is unclear what refund claims are subject to the reconfigured scheme. In denying federal retirees the relief of the general omnibus refund statute in *Ragsdale*, the court below expressly rejected the respondent's "contention that the general refund statutes are *now* necessarily limited to correcting errors in calculation or legal interpretation." *Id.*, at 975-76 n.8. Obviously, then, the general refund statutes continue as the post-deprivation scheme for some Oregon income taxes declared invalid; however, by the court's " 'bait and switch' ", this post-deprivation scheme has a special unstated exception which excludes federal retirees enforcing their rights under *Davis*. Finally, the court's use of the phrase "*are now*," *Id.* at 976, tellingly reveals the court's own acknowledgment that *Ragsdale*

reconfigured Oregon's "*scheme*, unfairly, in midcourse." *Reich*, 115 S. Ct. at 550.

Contrary to the decision below, the State's dramatic *1992* reversal of position adopted in *Ragsdale* with respect to Oregon's postdeprivation remedy is precisely the type of " '[n]ovelty in procedural requirements,' " *Reich*, 115 S. Ct. at 551, which was condemned by this Court in *Reich*.[19] The claims of the court below that it was not engaging in a " 'bait and switch' " and that its decision was not "novel" cannot withstand scrutiny. *See, e.g., Borg v. Department of Revenue*, 308 Or. 34, 774 P.2d 1099 (1989) (applying *Davis* to order refunds of taxes and interest collected pursuant to invalidated tax laws).

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[19] Indeed, the Oregon Supreme Court's *novelty* in adopting the respondent's reversal of position as the holding of this case underscores that the result below was designed "to thwart review in this Court." *Reich*, 115 S. Ct. at 551. Under Oregon law, no party is permitted to assert a reversal of position, let alone prevail as the respondent has here on its reversal of position with respect to the state remedy available to federal retirees. As a matter of Oregon law, the respondent was bound by its position in *Lutbrown*. *See Hampton Tree Farms, Inc. v. Jewett*, 320 Or. 599, 613, 892 P.2d 683 (1995) ("The harm to the judicial system that arises from allowing a party in a later judicial proceeding to contradict the position successfully taken in a earlier judicial proceeding arises whether or not there is any detrimental reliance by another party."). *See also In re Matter of Cassidy*, 892 F.2d 637 (7th Cir.), *cert. denied*, 498 U.S. 812 (1990).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Oregon should be granted. Moreover, because the opinion below is in irreconcilable conflict with *Reich* and *Harper*, this Court should summarily reverse. *See, e.g., El Vocero de Puerto Rico v. Puerto Rico*, 113 S. Ct. 2004, 2006 (1993) (granting petition for certiorari and reversing judgment below); *United States v. Nachtigal*, 113 S. Ct. 1072, 1074 (1993) (same).

Respectfully submitted,

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